Supreme Court, U. S.
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NO. 79-913

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * * * *

GUADALUPE H. GONZALEZ

Petitioner

VS.

TEXAS DEPARTMENT OF HUMAN RESOURCES

Respondent

* * * * *

RESPONDENT'S ANSWER TO APPLICATION FOR WRIT OF CERTIORARI

* * * * *

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ATTORNEY FOR THE RESPONDENT

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STATEMENT OF THE COUNTER-ISSUES

COUNTER-ISSUE NUMBER ONE (in response to Petitioners Question Number One)

Section 15.02(1)(D) of the Texas Family Code is not unconstitutionally vague on its face, nor is it unconstitutionally applied to the Petitioner.

COUNTER-ISSUE NUMBER TWO (in response to Petitioners Question Number Two)

The State of Texas exhibited threshold harm necessary to give the State a compelling interest sufficient to justify permanent termination of the parent-child relationship.

STATEMENT OF THE CASE

This is a case in which the Texas Department of Human Resources, Petitioner and Temporary Managing Conservator, instituted suit to terminate the Parent-child relationship between the Appellant, Guadalupe H. Gonzalez, and five of her children. The cause was filed in the District Court of Cameron County, 197th Judicial District, the Honorable Darrell B. Hester, presiding.

The Appellant appeared in person and by and through her Attorney of Record, the Honorable James Belton and the Honorable Susan Williams of the Texas Rural Legal Aid Inc.

Rolando Heath, father of the children surnamed Heath, died in 1967.

Tomas Gonzalez, Sr., father of Tomas Gonzalez, Jr., executed an affidavit of waiver of interest in the child and an affidavit of relinquishment of parental

rights. He also waived citation and service of process. Tomas Gonzalez failed to appear and wholly defaulted.

Leonzo de Leon, biological father of the children surnamed de Leon, although duly served with service of process and notification of the hearing, failed to appear and wholly defaulted.

The Honorable E. Dale Robertson appeared as Attorney ad Litem to represent the interests of all the children.

The caused was duly tried before a jury, which found through the submission of special issues that:

(1) Mrs. Gonzalez had knowingly placed all the children subject to the suit in conditions or surroundings which endangered their physical well-being.

(2) Mrs. Gonzalez had knowingly allowed all the children subject to the suit to remain in conditions or surroundings which endangered their physical well-being.

(3) Termination of the parent-child relationship between Mrs. Gonzalez and each of the children was in the best interest of each child.

(4) Appointment of the Cameron County Child Welfare Unit as Managing Conservator of each child would be in the best interest of each.

Judgment was rendered in accordance with the Jury findings.

Mrs. Gonzalez appealed to the Court of Appeals for the Thirteenth Supreme Judicial District. Chief Justice Paul Nye wrote the opinion of the Court (Gonzalez v. State Department of Human Resources, 581 S.W.2nd 522. (Tex.Civ.App.-Corpus Christi. 1979) affirming the Judgment on all points.

Mrs. Gonzalez then filed an application for Writ of Error in the Texas Supreme Court. The writ was refused when the Court found no reversible error.

STATEMENT OF THE FACTS

The facts as put forth in Chief Justice Nye's opinion are correct and need not be repeated here.

ARGUMENT AND AUTHORITIES REGARDING COUNTER-ISSUE NUMBER ONE

COUNTER-ISSUE NUMBER ONE (in response to Petitioners Question Number One)

Section 15.02 (1)(D) of the Texas Family Code is not unconstitutionally vague on its face.

Petitioner's attack on the constitutionality of the Statute turns on the issue of vagueness.

Mrs. Gonzalez relies heavily on the case of Alsager v.District Court of Polk County, Iowa, 406 F. Supp. 10 (S.D.Ia. 1975), aff'd 545 F2d 1137 (8th Cir. 1976). As pointed out by Chief Justice Paul W. Nye in his opinion in the case of Sanchez v. Texas Department of Human Resources, 581 S.W.2d 260 (Tex.Civ.App.-Corpus Christi, 1979 no writ).

> ...(A) careful reading of the opinion of the Eighth Circuit panel in affirming the case reveals that the appeals court expressly declined to affirm the District Court's opinion on the basis of the 'vagueness and over-

> breadth attacks upon facial validity' of the statute." Page 11.

Specifically the Alsager Court said:

> Although we decline to resolve whether the statutory provisions cited above are facially unconstitutional, as alternatively held by the District Court, we cannot refrain from noting, at minimum, that both the vagueness and overbreadth attacks upon these provisions are serious ones. By declining to affirm on these grounds, however, we afford the Iowa courts an additional opportunity to give the statutory provisions a plainly desirable limiting construction. See Grayned v. City of Rockford, 408 U.S. 104, 111-112, 92 S.Ct. 2294, 33 L.Ed. 2d 222 (1972) (vagueness), and Broadrick v. Oklahoma, 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed. 2d 830 (1973) (overbreadth). Given the obvious comity concerns at issue, we view such disposition as the one most appropriate. Page 1138.

The constitutionality of Section 15.02 has developed a history of support in the Texas Appellate Courts. Sanchez v. Texas Department of Human Resources, 581 S.W.2d 260 (Tex.Civ.App.-Corpus Christi, 1979, no writ); Crawford v. Crawford, 569 S.W.2d 505 (Tex.Civ.App.-San Antonio, 1978, no writ); Lane v. Jefferson County Child Wel-

fare Unit, 564 S.W.2d 130 (Tex.Civ.App.-Beaumont, 1978, writ ref'd n.r.e.); McGowan v. State, 558 S.W.2d 561 (Tex.Civ.App.-Houston [1st District] 1975, no writ).

Additionally, statutes of other jurisdictions have passed constitutional muster.

Oregon Revised Statute 419.523 states in part:

> (2) The rights of the parent or parents may be terminated in Subsection (1) of this Section if the Court finds the parent or parents:
>
> (a) are unfit by reason of conduct or condition seriously detrimental to the child.

The Oregon Supreme Court found the Statute was not void for vagueness in State v. McMaster, 486 P.2d 567 (Ore.Sup. Ct. 1971).

The South Dakota Statute (S.D.C.L. 28-8-6) states in part:

> "Neglected or dependent child defined. In this chapter unless the context otherwise plainly requires 'neglected or dependent

> child' means a child: whose parent, guardian, or custodian has abandoned him or has subject him to mistreatment or abuse; who lacks proper parental care through the actions of omissions of the parent, guardian, or custodian; whose environment is injurious to his welfare; whose parent, guardian, or custodian fails or refuses to provide proper or necessary subsistence, education, medical care or any other care necessary for his health, guidance, or well-being; or who is homeless, without proper care, or not domiciled with his parent, guardian, or custodian through no fault of his parent, guardian or custodian. Provided however, notwithstanding any other provision of this chapter, no child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for that reason alone, be considered to have been neglected within the purview of this chapter."

The South Dakota Supreme Court held the Statute was not void for vagueness. See Matter of D.T., 237 N.W.2d 166

(S.D.Sup.Ct. 1975) and Matter of SJZ, 252 N.W.2d 224, (S.D.Sup.Ct. 1976).

The Maryland termination Statute (Article 26, Subsection 52(f) defines the neglected child as one:

> (1) who is without proper guardianship;
> (2) whose parent, guardian or person with whom the child lives, by reason of cruelty, mental incapacity, immorality or depravity, is unfit to care properly for such a child;
> (3) who is under unlawful or improper care, supervision, custody or restraint, by any person, corporation, agency, association, institution or other organization or who is unlawfully kept out of school;
> (4) whose parent, guardian or custodian neglects or refuses, when able to do so, to provide necessary medical, surgical, institutional or hospital care for such child;
> (5) who is in such condition of want or suffering or is under such improper guardianship or control, or is engaged in such occupation as to injure or endanger the morals or health or other;
> (6) who is living in a home

> which fails to provide a stable moral environment.

The statute was not found to be void for vagueness in the case of In Re Cager, 248 A2d 384 (Md.App. 1968). Also see In Re Trader, 325 A2d 398, 411 (Md.App. 1974) and Matter of Grant, 264 N.W.2d 587, 592 (Wis.Sup.Ct. 1978).

Counsel for Mrs. Gonzalez directs the Court's attention to instances (Arkansas and Alabama) where involuntary termination of parental rights statutes were found impermissably vague. (Roe v. Conn, 417 F.Supp. 769 (M.D.Ala. 1976) and Davis v. Smith, 583 S.W.2d 37 [Ark.Sup.Ct. 1979]).

The Texas Statute under examination here does not resemble either Statute in Roe or Davis.

In Davis, Arkansas permitted adoption without the consent of parents if:

> the parents....are unable to provide a proper home for the children...." (Ark.Stats. §56-128(2)(h) (Supp. 1977)

Discussing the case, the Court said:

> Before discussing the reasons for our disposition of this case, there are matters pertaining to the record and the proceedings that should be stated to avoid misunderstandings as to the effect of our holding. There was no appeal from the juvenile court order by which Arkansas social Services was given custody of these children and that order is not under review here. The allegations of the petition for guardianship charging appellants with unfitness because of abandonment, depravity and desertion were abandoned by the petitioner just at the outset of the hearing and the petitioner elected to rely upon his allegation that appointment of a guardian with authority to consent to adoption was sought because the parents are unfit to properly care for the children and will not be able to care for them. When this election was made, petitioner's attorney stated that reliance was placed upon Ark.Stat.Ann. §56-128(2)(h). The probate court's order was based upon its finding that 'the parents are not fit and competent to have custody and control of said children and are unable to provide a proper home for the children as set out in Ark.Stat.Ann. §56-128(2)(h).' In orally stating his findings, the probate judge concluded

> that, based upon the evidence, the parents have failed to provide a proper home for the children." Page 39-40.

The Arkansas Supreme Court, before passing on the issue of constitutionality of the statute recognized; 1) Parental rights and the integrity of the family unit as a civil and personal right more precious than property rights; 2) Parental rights are not, beyond limitation in the public interest; 3) the State's constitutional interest extends to the welfare of the child; and 4) Parental rights are not immune from interference by the State in the role of parens patriae. The Court then set forth some of the standards it considered in arriving at its holding.

> Mathematical certainty in language is not to be expected in any statute. Grayned v. City of Rockford, supra. See also, Robinson v. United States, 324 U.S. 282, 65 S.Ct. 666, 89 L.Ed. 944 (1945). Flexibility and reasonable breadth, rather than meticulous specificity or great exactitude, in a statute are

permissible, so long as its reach is clearly delineated in words of common understanding. Grayned v. City of Rockford, supra; Minor Children of F.B. v. Caruthers, 323 S.W.2d 397 (Mo.App., 1959). A statute which defines boundaries sufficiently distinct for citizens, policemen, juries and appellate judges is not impermissibly vague. Grayned v. City of Rockford, supra. Impossible standards of specificity are not required by the constitution, even in criminal statutes, and a statute meets constitutional muster, if the language used conveys sufficient warning when measured by common understanding and practice. Jordan v. DeGeorge, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951); United States v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947). It is not necessary that all kinds of conduct falling within the reach of the statute be particularized. City of Chicago v. Fort, 45 Ill.2d 12, 262 N.E.2d 473 (1970). A statute is not to be struck down as vague only because marginal cases could be put where doubles might arise. United States v. Harris, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954). The futility of anticipating and enumerating every means or method a fertile mind might devise that would come within the purview of a statute is obvious. City of

Chicago v. Fort, supra; Minor Children of F.B. v. Caruthers, supra.

The problem with the Arkansas statute was use of the term "proper home." The court complained such an expression was open to multiple meanings.

Ultimately the Court held:

> We deem the statutory provision in question to leave the discretion vested in judges so broad that arbitrary and discriminatory parental terminations are inevitable. Cf. Alsager v. District Court of Polk County, supra. Since we find Ark.Stat. Ann. §56-128(2)(h) too vague to meet due process requirements of both the state and federal constitutions, and the petition and judgment totally dependent on that provision, appellees having elected to stand on that provision only, we must not only reverse the judgment but also dismiss the petition. (emphasis added). Page 41.

The Texas Statute involved in the instant case would withstand the analysis in Davis.

Roe involved the summary seizure of children and in that sense would be

parallel to Chapters 11 and 17 of the Texas Family Code. (Involuntary termination is set forth in Chapter 15 of the Texas Family Code).

Alabama Code Title 13 §350(2) reads in part:

> The words 'neglected child' shall mean any child, who, while under sixteen years of age has no proper parental care or guardianship or whose home, by reason of neglect, cruelty, or depravity, on the part of his parent or parents, guardian or other person in whose case he may be, is an unfit and improper place for such child or is under proper or insufficient guardianship or control as to endanger the morals, health or general welfare of such child or who for any other cause is in need of the care and protection of the State."

The Alabama Trial Court based his ruling on the simple fact that: "it is not a healthy thing for a white child to be the only [white] child in a black neighborhood." (Page 775).

The case presently before the Court

is not one of summary seizure and is therefore clearly distinguishable from Roe. The Court in Roe quotes Alsager and Grayned v. City of Rockford, 408 U.S. 104 (1972). The Roe Court follows a similar "void for vagueness" analysis as set forth by other State and Federal Courts.

The Texas Statute requires a dual finding. 1) That the person/parent knowingly engaged in prohibited conduct and 2) that termination is in the child's best interest.

The determination under subsection 1 requires the finder of fact to determine two seperate things. a) The party engaged in conduct which endangered the child and b) the party acted knowingly; knowingly is defined in the Texas Penal Code §6.03(b):

> A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A per-

son acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result."

It is apparent the statute clearly sets out the nature of the prohibited conduct, the culpable mental state and is not impermissibly vague.

ARGUMENT AND AUTHORITIES REGARDING COUNTER-ISSUE NUMBER TWO

COUNTER-ISSUE NUMBER TWO (in response to Petitioners Question Number One)

> The State of Texas exhibited threshold harm to give the State a compelling interest sufficient to justify permanent termination of the parentchild relationship.

Mrs. Gonzalez would have this Court believe the State refused or failed to provide some rehabilitative service, thereby essentially refusing to re-unite her family. This is a factual argument unsupported by the record.

The State of Texas readily conceeds the fundamental nature of the rights

involved in the family unit. The integrity of unit and the privacy it deserves are of utmost importance. It is the consistent policy of this State to intrude into the family unit under only the most dire situations.

In 1977, a three Judge Federal panel in Houston, Texas declared huge sections of the Texas Family Code unconstitutional (Sims v. The Department of Public Welfare of State of Texas, 438 F.Supp 1179 [S.D.Tx. 1977]).

The Department of Human Resources (formerly Department of Public Welfare) initiated a series of policy changes and operational reforms so as to immediately comply with the order entered in Sims.

However, in 1979, this Court considered Moore v. Sims, _____U.S._____, 99 S.Ct. 2371 (1979) and reversed and remanded the case based on Younger v. Harris, 401

U.S. 37 (1971) and Hoffman v. Pursue, Ltd., 420 U.S. 592 (1975).

One cannot attribute motives to the Texas Legislature. Nevertheless, during the 1979 session, the legislature re-wrote large sections of Title 2 of the Texas Family Code. Only Chapter 16, dealing with adoption, was left untouched. Chapter 17, Emergency Procedures in Suit by Governmental Entity was re-written and Chapter 18, Review of Placement of Children Under the Care of the Department of Human Resources was added.

The Texas Legislature demonstrated its sensitivity to the conflict of rights in suits effecting the parent-child relationship.

The rights of the parents, particularly with regard to procedural due process, were strengthened and expanded.

It should be noted that despite this demonstrated concern, sensitivity and legislative effort, the lawmakers did not see fit to modify or change §15.02(1)(D) which is under attack here.

CONCLUSION AND PRAYER

Considering the foregoing, Respondent (Appellee in the Court below) prays this Honorable Court refuse the Application for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the following Brief for Appellee has been posted in the United States Postal Service, Certified Return Receipt Requested on this the ____ day of _____, 1980 to: James E. Belton, Attorney at Law, Texas Rural Legal Aid, Inc., 1154 East Elizabeth Street, Brownsville, Texas 78520; Susan Williams, Attorney at Law, Texas Rural Legal Aid, Inc., 103 East Third, Weslaco, Texas, 78596; and E. Dale Robertson, Attorney ad Litem, 950 East Van Buren, Brownsville, Texas, 78520.

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